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STUDENT WORKS

Copyright and the First Amendment

JEFFREY OAKES*

The author proposes a novel approach to the resolution of conflicts between a copyright holder's interests and the public's first amendment right to receive information of public interest and concern. Rejection of customary balancing is advocated in favor of a more workable and predictable method of dealing with highly complex and potentially volatile conflicts.

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I. INTRODUCTION

An objective examination of the copyright clause of the Constitution¹ and the first amendment reveals an inherent conflict. A copyright holder is given an exclusive property interest in an original work he has created or produced, while the first amendment includes certain guarantees—freedom of speech and freedom to know or to hear. These first amendment guarantees could, arguably, eliminate any rights bestowed by a copyright statute. Yet, the two have coexisted with only minor conflict since the writing of the first Copyright Act in 1790.² The possibilities of a major conflict, however, increase with the expansion of first amendment doctrine.

This comment will examine the potential conflict in three

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1. U.S. CONST. art. 1, § 8, cl. 8: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."

2. Federal Copyright Act of 1790, ch. 15, 1 Stat. 124.

parts, beginning with a brief look at the Copyright Act of 1976 (the Act)³ which took effect on January 1, 1978. That section will review the "fair use" doctrine and the statutory exemptions which offer some first amendment protection. The second section will focus on the first amendment, and a standard will be developed to enable courts to resolve conflicts between copyright interests on the one hand and first amendment concerns on the other. The final section will compare this standard to the conventional approach in the field.

The standard developed here is a novel one, especially in how it deals with the situation where the copyright holder, through the proprietary right afforded by the statute, limits access to matters of public or general concern. Where there is such tension, the first amendment rights of potential listeners, viewers and readers should prevail. Prior cases support such an analytical framework, and it is suggested that it is a more workable and equitable mode of dealing with recurring conflicts in this area.

Copyright provides an important method of protecting a person who has expended time and energy in creating a work and who is justifiably entitled to all consequential benefits. Some form of copyright is unquestionably essential in order to protect writers, inventors and artists, as well as to encourage creativity and to provide economic incentive. The real question is: What constitutes an actionable copyright infringement? The first amendment defense for an alleged infringer has not heretofore provided automatic protection. However, if a copyright owner attempts to monopolize or to restrict access to certain materials of public interest through his property right, then a claim of first amendment rights should offer protection to a disseminator of the material. Since copyright and the first amendment must ideally coexist, the central issue involves a determination of the extent to which first amendment guarantees erode the copyright holder's interests. That is, how strong is the copyright holder's exclusive property right in the face of a first amendment claim?

This comment will approach the problem of defining infringement through an application of Alexander Meiklejohn's "public speech theory,"⁴ which has as its central concept free accessibility of all information of public interest or concern.

3. 17 U.S.C.A. §§ 101-710 (1977).

4. A. MEIKLEJOHN, *POLITICAL FREEDOM—THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1948).

II. THE COPYRIGHT ACT OF 1976

After fifteen years of debate in Congress, the new Act⁵ finally emerged as a much needed revision of the antiquated Copyright Act of 1909.⁶ Technological advances in both communications and copying had rendered the 1909 law obsolete.

For the purposes of this comment, sections 107 through 118 of the new law are the most relevant. Section 107 codifies, for the first time, the fair use doctrine,⁷ while sections 108 through 118 provide exemptions for uses of material that would be otherwise protected under section 106.⁸ Taken together, these exemptions and the fair use doctrine make protected information more accessible. In a sense, these provisions safeguard against the copyright holder's monopolistic property rights.

In *Mazer v. Stein*,⁹ the Supreme Court of the United States perceived an economic undercurrent in the copyright clause of the Constitution: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talent of authors and inventors in 'Science and useful Arts.'"¹⁰ The authorization to grant a limited monopoly is predicated upon two premises: (1) that the public benefits from the creative activities of authors; and (2) that the copyright monopoly is necessary to the realization of such activi-

5. Copyright Act of 1976, Pub. L. No. 94-553, tit. I, § 101, 90 Stat. 2541 (amending 17 U.S.C. §§ 1-216 (1976)).

6. Copyright Act of 1909, Pub. L. No. 349, ch. 320, 35 Stat. 1075.

7. The fair use doctrine permits an author to use the copyrighted work of another without first obtaining permission and without infringing the copyright. For the factors to be considered in a determination of fair use, see note 20 and accompanying text *infra*.

8. Section 106 provides:

Subject to sections 107 to 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or binding;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C.A. § 106 (1977). For a summary of §§ 108-18, see note 32 and accompanying text *infra*.

9. 347 U.S. 201 (1954).

10. *Id.* at 219.

ties. "Implicit in this rationale is the assumption that in the absence of such public benefit the grant of a copyright monopoly to individuals would be unjustified."¹¹ The Court also noted in *Mazer* that reward to the owner was a secondary consideration.¹² Therefore, within the Act itself there is a subtle conflict between two interests or social policies. One favors the broad dissemination of ideas and new forms of expression, while the second gives the authors and writers a sufficient monopoly to ensure rewards for their efforts.¹³

The courts recognize two essential principles before copyright protection is afforded. First, the *manner* in which ideas or themes are expressed is protected, while the actual ideas, themes or characters are not.¹⁴ Second, copyright only protects material originally conceived by the copyright holder.¹⁵ These concepts have been explicitly incorporated into the new Act.¹⁶ Should a work have these characteristics, the owner of the copyright has the exclusive right to authorize reproduction of the copyrighted work, prepare derivative works based upon the copyrighted work, distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, and in certain instances to perform and to display the copyrighted work publicly.¹⁷ These exclusive rights are subject to the fair use doctrine and exemptions embodied in sections 107 to 118 of the Act.

11. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-29 (1978).

12. 347 U.S. at 219.

13. See *United States v. Bily*, 406 F. Supp. 726, 730 (E.D. Pa. 1975).

14. *Mazer v. Stein*, 347 U.S. at 217; *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612, 612 (2d Cir. 1945); *Fuld v. National Broadcasting Co.*, 390 F. Supp. 877, 881 (S.D.N.Y. 1975); *Gethers v. Blatty*, 283 F. Supp. 303, 305 (C.D. Cal. 1968).

15. See *Mazer v. Stein*, 347 U.S. at 217; *Fuld v. National Broadcasting Co.*, 390 F. Supp. 877, 881 (S.D.N.Y. 1975).

16. 17 U.S.C.A. § 102 (1977). Section 102 of the Act defines the subject matter of copyright as follows:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audio visual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.

17. *Id.*

In essence, fair use and other exemptions set forth in the new statute provide some limitations on what would otherwise be an exclusive right. In certain instances their scope of protection is too limited and in those situations a first amendment defense is needed. To understand better the need for such a defense, a brief discussion of fair use and the new exemptions is necessary.

A. Fair Use

As defined vaguely in the Copyright Act of 1976, the fair use doctrine is derived from an extensive body of law¹⁸ that was scrutinized closely by the draftsmen of the Act.¹⁹ The factors determinative of fair use are:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁰

The intent of such general language is to keep the doctrine flexible and to allow courts to decide situations on a case by case basis.²¹

Fair use is at the heart of the copyright scheme and balances two opposing interests: one which encourages access and the other which maximizes financial gain. Generally, the courts seem to agree that the purpose of the doctrine is to "subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."²² They differ, however, in defining precisely the standard for determining fair use in each particular case.

Literary criticism is the most widely recognized application of the fair use doctrine. This use is recognized by the statute, along with such other forms as commentary-news reporting, teaching

18. See, e.g., *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1976), *modified*, 560 F.2d 1061 (2d Cir. 1977); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

19. H.R. REP. No. 1476, 94th Cong., 2d Sess. 65, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5678.

20. 17 U.S.C.A. § 107 (1977).

21. H.R. REP. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5680.

22. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964). See also *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1976), *modified*, 560 F.2d 1061 (2d Cir. 1977).

(multiple copies for classroom use), scholarship and research.²³ These represent some of the simpler situations in which the doctrine is invoked. In designating these areas, Congress must have considered them protected due to public interest. If the Congress has mandated, for the purpose of the above uses, that the copyright holder's interest must be subordinated to the public's interest, some elements of the first amendment are necessarily intertwined with the doctrine of fair use.²⁴ The doctrine, however, is too limited in scope and predictability to determine consistently the nature of this interaction. Melville Nimmer, one of the leading scholars in the copyright field, argues that fair use decisions can be explained best by looking to the central question of whether a defendant's use tends to diminish or prejudice the potential sale of the plaintiff's work. Regardless of the medium, so long as defendant's material performs a different function than that of plaintiff's, it may contain substantially similar material, and the fair use defense may be invoked. The general principle is that the scope of fair use is restricted to situations where the two works in issue fulfill the same function in terms of actual or potential consumer demand.²⁵ Nimmer does not consider the public interest aspect of the doctrine. Rather, he chooses to place his emphasis on the author's economic incentives and the protection of the copyright structure.²⁶

Leon Seltzer,²⁷ in an extensive article discussing fair use and the exemptions in the new statute,²⁸ approaches fair use in a fashion

23. 17 U.S.C.A. § 107 (1977).

24. See Rosenfeld, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975).

25. 3 M. NIMMER, *supra* note 11, § 13.05[B], at 13-58.

26. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (libraries' copying and distributing of journal and magazine articles was considered fair use). For criticism of this case, see 3 M. NIMMER, *supra* note 11, § 13.05[E][4][c], at 13-73 to -81. Nimmer's standard of fair use makes understandable his criticism of *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). Random House had published a biography of Howard Hughes that incorporated large portions of copyrighted articles printed in *Look* magazine ten years before. Rosemont, who had purchased the copyrights, attempted to prevent publication of the book, claiming copyright infringement. The court decided that this was fair use because of a need for public dissemination of information since, it reasoned, Hughes was a public figure. Nimmer felt this was undermining the copyright system, since both works went essentially to the same function. The case's first amendment language further disturbed Nimmer. That aspect will be discussed in greater detail in section IV *infra*.

27. Leon Seltzer is director of the Stanford University Press and a member of the California bar.

28. Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 BULL. COPYRIGHT SOC'Y 215 (1976-77). Seltzer criticizes the statutory treatment from three approaches: (1) it makes no effort to define fair use; (2) it does not provide guidelines for ordering the four factors; and (3) by creating exemptions (e.g.,

similar to Nimmer. He argues that the fourth statutory factor, the extent of the effect of use upon the potential market for the copyright, should be the first factor considered in determining fair use. Any analysis of fair use, according to Seltzer, should start from the author's perspective.

He proposes that a more useful statute would read: "Fair use is use that is necessary for the furtherance of knowledge, literature, and the arts AND does not deprive the creator of the work of an appropriately expected economic reward."²⁹ This approach suggests balancing the factor of access against the general copyright interests of encouraging creativity by offering substantial economic incentives.

Seltzer supports his proposition by developing a dual perspective framework of "normal expectations." Authors and society entrust their interests to the copyright scheme, taking a risk that the costs to each will not be unbearable. Their dual risks are posed by two questions:

Is this use within the risk the author was taking that he would not be paid? Is this use within the risk society was taking that the author would assert control of access? Since both questions turn on the appropriate expectations of each, the determination of fair use in a particular instance will decide whether the author's expectation of economic reward was or was not appropriate, and such a determination ought to coincide with a simultaneous judgment about whether society's expectation of denial of access was or was not appropriate.³⁰

Seltzer's test requires a substantial balancing of interests to determine fair use, with the weight being placed on economic incentive for the author. Seltzer argues that this dual-risk approach should enable the courts to handle any conceivable situation.³¹

teaching and research), it blurs the distinction between fair use and the exemptions. *Id.* at 231.

29. *Id.* at 243.

30. *Id.* at 242. Courts will permit a second author to make use of a prior author's research. See *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957).

31. Seltzer argues that the dual-risk approach would encompass reasonable free speech considerations. Nimmer deals with *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (whether the use of frames from the Zapruder film of the Kennedy assassination in a book was fair use), and *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), in his discussion of the first amendment and copyright. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970). Seltzer does not see the need to pose an adversary relationship between the first amendment and fair use. Application of the fair use test of "appropriately expected economic reward," modified by the necessity of access test, would provide for the free speech considerations, would reach the same result as in *Bernard Geis* and would not require the

In most situations the copyright holder could argue that any use of his material, no matter how far in the future, will deprive him of certain economic gains. The question thus becomes: How long can one retain the copyright and deny access to information? If one examines the question from Seltzer's view, looking at the author's economic expectation, the balance would certainly favor the copyright holder. Nimmer's standard would have the same result—no matter how far in the future the use takes place, if both works perform the same function, there is definite economic harm. It is difficult to predict what result would be reached under the statute. When one analyzes this problem under the four statutory factors of the Act, the result is less obvious.

Because of the indefiniteness of the statute and the countervailing factor of the author's economic concerns, it is difficult to predict when one may use another's work. Though a useful tool, fair use in no way allows an individual to exercise his first amendment rights by making more accessible to the public copyrighted material.

B. Other Statutory Exemptions

With fair use, the concern is in predicting how the courts will determine the line between protected uses and a use that is not permitted by the copyright statute. The other statutory exemptions concern uses that, although fully protected by copyright, are exempt from the copyright control of the author for reasons of public policy as determined by Congress. Congress, in sections 108 through 118 of the new statute, has taken control of access away from the author for two reasons: (1) a competing constitutional interest requires that a particular use of the work should be *free of cost*; or (2) a competing constitutional interest requires that access not be restricted *except for cost*.³²

use of the first amendment. Seltzer agrees with Nimmer that the copying of the *Look* articles involved in *Rosemont* could not be justified on either first amendment or fair use grounds. Seltzer argues that the fair use issue was never squarely faced and that his dual-risk approach would help ferret out the real fair use issues.

32. For the purposes of this comment it is only necessary to describe briefly the exemption provisions under the new statute. Under 17 U.S.C.A. § 108 (1977), a library or archives may reproduce "no more than one copy" and distribute it if: (1) there is no direct or indirect commercial advantage; (2) the library collections are open to the public; and (3) the reproduction includes a notice of copyright. There are other qualifying provisions within § 108, which basically exempt the limited use of copyrighted material from copyright infringement. Section 109 permits the owner of a copyrighted work to sell or dispose of it and to display the copy publicly without the authority of the copyright holder. Section 110 exempts certain performances and displays of dramatic or nondramatic literary or musical works from copyright infringement. They are exempt when used for educational purposes, performed in the course of religious worship or other religious assembly, performed for the public without any

A cursory examination of sections 107 through 118 reveals that, although the sections do not seriously diminish the copyright holders' monopoly rights, information and materials are now more accessible to the public. The inclusion of the exemptions in the new statute demonstrates the congressional awareness of the problem that developed as technology rapidly expanded. The exemptions, some providing access without cost and others guaranteeing access by license, however, are not sufficiently broad to provide the guarantees that are essential in situations where the first amendment conflicts with a copyright. As with fair use, the exemptions offer some protection, albeit inadequate, of first amendment rights.

There is an essential need for a standard to measure conflicts between copyright on the one hand and the first amendment on the other. The next two sections of this comment will attempt to develop such a standard.

III. THE FIRST AMENDMENT

Alexander Meiklejohn³³ argues that free speech is protected under the first amendment as an essential element of intelligent self-government in a democratic system. It is recognized, however, that this is a narrow interpretative view, and is not necessarily a

purpose of direct or indirect commercial advantage and in other circumscribed areas. Under § 111, certain secondary transmissions are exempted totally, while others are now subject to a compulsory license. Section 112 permits a transmitting organization to make one copy of a particular transmission program and retransmit it for up to six months in its own broadcasting area. It permits a governmental body or nonprofit organization to make 30 copies of a performance, so long as all but one, for archival purposes, is destroyed after seven years. Section 112 also permits the reproduction for distribution of one copy of a nondramatic musical work of a religious nature. In addition, it allows governmental bodies or nonprofit organizations entitled to transmit performances the right to make 10 copies for their own use. Section 113 largely adopts the basic principle of *Mazer v. Stein*, 347 U.S. 201 (1954) (copyright in a pictorial, graphic or sculptural work will not be affected if the work is employed as the design of a useful article and there is protection for the copyright owner against unauthorized reproduction). However, § 113 permits the use of displays or pictures in connection with advertisements or commentaries related to distribution of the product. Section 114 gives exclusive rights of a sound recording, as described in § 106, to the copyright holder. Section 115 makes the exclusive rights provided by §§ 106(1) and (3) subject to compulsory licensing. Any person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. Section 116 limits the exclusive right of public performance under § 106(4) by permitting the operation of coin operated record players. The operator must: (1) obtain a compulsory license by filing an application; (2) affix a certificate issued by the Register of Copyrights; and (3) pay royalties. Section 117 deals with the rights of copyright holders and information stored in computers. Section 118 makes more accessible certain works for public broadcasting upon the payment of a reasonable royalty.

33. Alexander Meiklejohn, although not a lawyer, was one of the leading figures in the area of first amendment theory. He first presented his theory on free speech and its relation to self-government at the University of Chicago, and later presented it at the law schools of Yale University and St. John's College.

viable theory in all first amendment situations. Professor Tribe responds aptly in his new treatise:

This Theory would limit the special guarantees of the first amendment to public discussion of issues of civic importance; in exchange for offering supposedly "absolute" protection to a political category of discourse, the theory would relegate to only minimal due process protection everything outside that category. When critics respond that the "public issues" category is obviously far too narrow unless it becomes almost infinitely expandable, the theory—in the hands of all but its truest believers—obligingly expands to encompass "novels and dramas and paintings and poems," as well as even commercial information, insofar as all of these may *indirectly* contribute to the sophistication and wisdom of the electorate. Yet when the theory has been thus expanded, it tells us disappointingly little. Indeed in none of its forms does it tell us a great deal, since it takes for granted the *virtues* of the self-governance to which it argues that free speech is so necessary.³⁴

Furthermore, Judge William Hastie wrote of Meiklejohn's theory:

The results of such a reading of the free speech clause would be twofold. It would limit the area of applicability and at the same time strengthen the protection afforded within the defined area. It would preclude the judicial freewheeling that at times characterizes our application of an explicit and unqualified constitutional prohibition.³⁵

Despite this criticism,³⁶ it is the perfect first amendment inter-

34. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 577-78 (1978) (emphasis in original).

35. Hastie, *Free Speech: Contrasting Constitutional Concepts and their Consequences*, 9 HARV. C.R.-C.L. L. REV. 428, 434 (1974).

36. Other theories of the first amendment give credence to Meiklejohn's theory. See T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 3-15 (1966). Emerson develops his theory in the first chapter: "The Function of Freedom of Expression in a Democratic Society." There are four categories into which Emerson groups the reasons for protecting freedom of expression:

Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as the means of maintaining the balance between stability and change in the society.

Id. at 3.

Emerson's first value of freedom of expression is justified as the right of an individual by reason of his capacity as an individual. This means that man has a right to develop his mind and formulate opinions. "From these concepts there follows the right of the individual to access to knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his society and state." *Id.* at 5-6. The core of Meiklejohn's theory is the notion of access and its vitality in a self-governing system. He argues more persuasively that all ideas should be available.

pretation to apply to copyright. It allows first amendment rights to be protected, while at the same time preserving copyright interests. Some of the questions not covered by this approach will find protection in the new copyright statute, and with the doctrine of fair use together with the exemptions,³⁷ many areas of alleged infringement will not need first amendment protection.

Since the public speech theory provides the best test for copyright infringements and first amendment claims, it is necessary to define Meiklejohn's thesis in greater detail.

A. *Meiklejohn's Theory*

Meiklejohn places his faith in the people and argues that the essence of the Constitution is its authors' underlying philosophy of a politically free society—the belief in self-government.³⁸ Within such a self-governing process there will be times when freedom will be restricted, but that is an inevitable byproduct of social life.

At the bottom of every plan of self-government is a basic agreement, in which all citizens have joined, that all matters of public policy shall be decided by corporate action, that such decisions shall be equally binding on all citizens, whether they agree with

Emerson's second value is the "Attainment of Truth," which supports Meiklejohn's philosophical framework and the basic idea of making information available:

The theory starts with the premise that the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition . . . [An individual] must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false. Conversely, suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error. This is the method of the Socratic dialogue employed on a universal scale.

Id. at 7.

Emerson's third main function of freedom of expression is to provide for participation in decisionmaking. "In order for the process to operate at its best, every relevant fact must be brought out, every opinion and every insight must be available for consideration." *Id.* at 9. Emerson notes that freedom of expression has particular significance in political activity. The basic theory, however, goes beyond and includes freedom of expression in religion, literature, art, science and all areas of human learning and knowledge. It is indispensable to the operation of the democratic form of government.

This supports Meiklejohn's theory, since it recognizes the importance of expression to the self-governing process. All ideas must be available for consideration—there should be no limitation on the access of ideas or opinions.

The availability of material lends itself to open discussion, which in turn provides for stability, Emerson's fourth tenet. Meiklejohn places his faith in the people—the final decisionmakers. Both Emerson and he would argue that freedom of expression lies at the core of the democratic society. *But see* Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUNDATION RESEARCH J. 521, 554-567 (1977).

37. 17 U.S.C.A. §§ 107-12 (1977).

38. A. MEIKLEJOHN, *supra* note 4, at 9.

them or not, and that, if need be, they shall, by due legal procedure, be enforced upon anyone who refuses to conform to them.³⁹

The heart of Meiklejohn's theory is that the American form of government rests upon a "compact"⁴⁰ that the people of the United States are to be self-governed and that everything else is subservient to this underlying philosophy. The citizens of this nation shall make and obey their own laws; they shall be their own subjects and their own masters. Meiklejohn concludes his theoretical framework by noting:

It is ordained that all authority to exercise control, to determine common action, belongs to "We, the People." We, and we alone, are the rulers. But it is ordained also that We, the People, are, all alike, subject to control. Everyone of us may be told what he is allowed to do, what he is not allowed to do, what he is required to do Control by a self-governing nation is utterly different in kind from control by an irresponsible despotism. And to confuse these two is to lose all understanding of what political freedom is. Under actual conditions, there is no freedom for men except by the authority of government. Free men are not non-governed. They are governed—by themselves.⁴¹

The first amendment has an essential role in the self-governing system. It reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁴² Though considered an absolute right, it does not preclude the imposition of reasonable restrictions on one's freedom by the government.⁴³

With this method of self-government, the point of ultimate interest is not the words of the speakers; rather, it is the minds of the hearers. The idea of access to ideas is at the core of the public speech theory. "That is why freedom of discussion for those minds may not be abridged."⁴⁴

The essence of Meiklejohn's argument is that no speaker should be barred from speaking because his views may be false or dangerous. All ideas should be available to the populace.

39. *Id.* at 14.

40. *See* U.S. CONST. preamble.

41. A. MEIKLEJOHN, *supra* note 4, at 18-19.

42. U.S. CONST. amend. I.

43. The paradox is that the first amendment "does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech." A. MEIKLEJOHN, *supra* note 4, at 21 (emphasis in original).

44. *Id.* at 26.

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American The principle of the freedom of speech springs from the necessities of the program of self-government It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.⁴⁵

The freedom to express all ideas should not be abridged.

Meiklejohn's great faith in self-government rests upon the education of the masses. Only through access to free information may the governors govern. The first amendment is intended to offer this type of protection. Under the public speech theory, the critical question is whether a given utterance contributes to public communication rather than whether the end it serves may outweigh other values or objectives of the body politic. The first amendment is construed as a charter of universal and equal participation in self-government.⁴⁶ Thus, the questions that have to be asked are how is "speech" to be identified in contrast to other utterances not entitled to protection, and how is "public" to be defined. These questions are important not only in their relationship to the public speech theory as a whole but in how the theory should be applied to copyright.

Donald Meiklejohn answers those questions in his article on public speech:

The answer to the first question requires distinguishing between "speech" as the free communication of ideas and "actions" amounting to coercion or manipulation incompatible with the unfettered formation of public opinion. The answer to the second question requires distinguishing between events the knowledge of which contribute to the formation of public opinion necessary to effective self-government and those events which are circumscribed by a "privacy area into which the public can claim no need to intrude."⁴⁷

In other words, the public speech theory is concerned only with speech that relays important and meaningful information to the public. The first amendment provides absolute protection to the

45. *Id.* at 27.

46. Meiklejohn, *Public Speech in the Supreme Court Since New York Times v. Sullivan*, 26 SYRACUSE L. REV. 819 (1977).

47. *Id.* at 829. Donald Meiklejohn is Alexander Meiklejohn's son, and a professor emeritus at Syracuse University.

free flow of ideas, regardless of their form, though it will condemn actions which are coercive. It also provides for absolute protection of all events that are essential to the functioning of a self-governing democracy while offering to protect those areas that are private or essential.

Meiklejohn derived the entire meaning of the free speech clause from the scheme of self-government written into the Constitution. His sense of governing did not limit speech to purely political utterances, but extended freedom of speech to literature, the arts and philosophy.⁴⁸ At the far reaches of his theory was the idea that novels, drama, poetry and painting are essential to self-government since they expose people to new ideas and stimulate their thinking. There must be total access to all ideas, ranging from purely political to merely entertaining. Thus, the government cannot prevent access by imposing forms of censorship or cutting off modes of communication.⁴⁹

Novels, drama, poetry and painting were characterized as having "governing importance." Meiklejohn's view, however, was not that the government had no role in restricting freedom of expression and that the first amendment offered absolute protection. He found no fault with laws and ordinances that required the speaker to conform to the necessities of the community with respect to time, place, circumstances and manner of procedure, so long as these were not used merely as a pretext for attempts to suppress speech which would otherwise be appropriate.⁵⁰ There is no contention that the copyright law falls into such a category. If, however, an author or composer should attempt to "suppress speech" through the use of his copyright or property right, he runs afoul of the first amendment. The use of such copyrighted material should not be considered an infringement; rather, it should be protected by the first amendment.

B. *New York Times Co. v. Sullivan and Beyond*

Acceptance of the "public speech theory" by the courts as a viable theory of interpreting first amendment rights has grown in

48. Meiklejohn, *The First Amendment is an Absolute*, [1961] SUP. CT. REV. 245, 262.

49. This is not to suggest that copyright cuts off communication, though potentially it could. If the government were to give a property right to an author, who then would control the work, that property right would not prevent dissemination of materials unless the holder of such a right attempted to block the spread of ideas. In this situation there would be a conflict, and where access is hindered, the first amendment should offer protection for any infringement.

50. See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

the past fifteen years. Beginning with *New York Times Co. v. Sullivan*,⁵¹ and followed by its progeny and the commercial advertising cases, there is sufficient case law to indicate that the courts would support a standard that used such a first amendment interpretation. This section discusses existing case law that supports the Meiklejohn interpretation in developing the standard to be applied when the first amendment and copyright protection clash.

In two landmark decisions, *New York Times Co. v. Sullivan*⁵² and *Garrison v. Louisiana*,⁵³ the Supreme Court of the United States adopted Meiklejohn's first amendment approach. Justice Brennan

51. 376 U.S. 254 (1964).

52. *Id.* Respondent Sullivan brought suit against four black Alabama clergymen and the New York Times Co. for libelous statements printed in a full page advertisement carried in *The New York Times*. The advertisement was a plea for funds to aid the civil rights movement in the South. The ad described certain events to indicate the hardships that blacks in the South were confronted with, but it only indirectly referred to the respondent. A jury, under instructions that the statements in the advertisement were libelous per se if the jury found that the petitioners had published such an ad and that the statements made concerned the respondent, returned a verdict for respondent of \$500,000, the full amount requested.

The background of the *Sullivan* case lay in the general recognition, at common law, of a qualified privilege in defamation actions of "fair comment" upon the conduct and qualifications of public officers and public employees. This was a broad privilege that extended to publication to the public of a matter of public concern. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 819 (4th ed. 1971).

The common law privilege of "fair comment" in public discussion was not limited to officials and candidates. It also extended to other matters of public concern. *See, e.g.*, *Kennedy v. Item Co.*, 197 La. 1050, 3 So. 2d 175 (1941); *Hoepfner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139, 237 N.Y.S. 123 (1930) (Cardozo, J.) (criticism of high school football coach held fair comment because of keen interest in high school sports); *Holway v. World Publishing Co.*, 171 Okla. 306, 44 P.2d 881 (1935) (consulting engineer for city water supply held subject of fair comment); *Bailey v. Charleston Mail Ass'n*, 126 W. Va. 292, 27 S.E.2d 837 (1943) (official's conduct in distribution of public funds held subject of fair comment); *Grell v. Hoard*, 206 Wis. 187, 239 N.W. 428 (1931) (highway commissioner held subject of fair comment); *Spriggs v. Cheyenne Newspapers*, 63 Wyo. 416, 182 P.2d 801 (1947) (general public held entitled to be aware of an attorney's involvement in disbarment proceedings); *see Beauharnais v. Pittsburgh Courier Publishing Co.*, 243 F.2d 705 (7th Cir. 1957) (plaintiff promoted racial hatred and was involved in the Cicero riots, which were of great public interest); *Flanagan v. Nicholson Publishing Co.*, 137 La. 588, 68 So. 964 (1915) (newspaper published an article about the plaintiff, a vice president of an international labor union, who used his influence to assist San Francisco in getting the World's Fair over New Orleans. The court held that the privilege rested on two grounds: (1) it was within the province of the newspaper to comment on the incident as a matter of news and of general public interest; (2) plaintiff's public role in Washington made him a public figure subject to such attack, condemnation and ridicule as is appropriate and necessary in a campaign where public opinion is sought to be molded.); *Duffy v. New York Evening Post Co.*, 109 App. Div. 471, 96 N.Y.S. 629 (1905) (newspaper article criticized individual in his role as a political leader). *See also* Comment, 52 CORNELL L.Q. 419 (1967); Note, 17 HASTINGS L.J. 346 (1965); Note, 20 RUTGERS L. REV. 390 (1966).

53. 379 U.S. 64 (1964). *Garrison* involved a state criminal libel statute. Appellant, the district attorney, made disparaging statements about the judicial conduct of the criminal district courts. Appellant was tried without a jury before a judge and convicted of criminal defamation.

wrote both opinions and began *Sullivan* by writing: "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct."⁵⁴

The underlying rationale of both opinions, approved unanimously, was that by imposing sanctions against the libelee, the state had violated the free speech clause of the Constitution.⁵⁵ The imposition of sanctions for such conduct resulted in the imposition of restrictions which went to the heart of the principle of self-government. In *Garrison*, Justice Brennan observed:

[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁵⁶

The court quoted the attack by Thomas Jefferson and James Madison against the Sedition Act of 1798.⁵⁷ Their premise was that the "Constitution created a form of government under which 'the people, not the government, possess the absolute sovereignty.'"⁵⁸ The Court also pointed to a statement made by James Madison in the House of Representatives: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government and not in the Government over the people."⁵⁹ Finally, the Court concluded that the "right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."⁶⁰

The thrust of the Court's decisions in *Sullivan* and *Garrison*, with their bold recognition of the public speech theory, is to guarantee that ideas and thoughts can be freely published and, therefore, more accessible. The Court noted that the Sedition Act, which re-

54. 376 U.S. at 256.

55. U.S. CONST. amend. I.

56. 379 U.S. at 74-75 (quoting in part *New York Times Co. v. Sullivan*, 376 U.S. at 270).

57. Sedition Act of 1798, 1 Stat. 596. The Act, popularly known as the Alien and Sedition Acts, expired by its terms in 1801 before the Supreme Court could rule on its constitutionality. It was widely believed, in any event, that the law was unconstitutional. See *New York Times Co. v. Sullivan*, 376 U.S. at 276.

58. *Id.* at 274.

59. *Id.* at 275.

60. *Id.*

strained criticism of government and public officials, was inconsistent with the first amendment, and that the guarantee of self-government required that no government sanctions be imposed on speaking or hearing.

Although extending the public speech doctrine, the Court has not adopted it as its singular method for handling first amendment problems. The most recent commercial advertising cases,⁶¹ however, have accepted the public speech theory. These cases, together with those that followed *Sullivan*, indicate that the Court might be amenable to applying this theory when confronted with a copyright and first amendment problem.

Sullivan and *Garrison* speak to the first step in the test suggested herein—access. The second part of the test is the definition of what should be considered matters of public concern. The Supreme Court first considered the relationship of the first amendment to matters of public concern in *Thornhill v. Alabama*,⁶² wherein Justice Murphy wrote: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."⁶³ The problem, ultimately, is in distinguishing public from private concerns—precisely the issue confronted by the progeny of *Sullivan*.

*Time, Inc. v. Hill*⁶⁴ illustrates the difficulty in dealing with this problem. James Hill and his family were held hostage for nineteen hours by three escaped convicts. They escaped unharmed and thereafter Hill attempted to avoid publicity. Six months later Joseph Hayes' novel, *The Desperate Hours*, based in part on the Hill story, was published and was subsequently made into a play. *Life* magazine then ran a story on the play with pictures of the Hill home and suggestions that the book was about the Hill family ordeal. Hill sued the publishers for false reporting. *Life's* defense was that the article was a matter of legitimate public interest. The New York courts ruled against *Life*. The Supreme Court reversed in a five to four decision that indicated the Court's inability to define precisely the public-private dichotomy.

Justice Brennan, in the opinion of the Court, rationalized that open debate and discussion, though not political expression or com-

61. See *Bates v. State Bar*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975); text accompanying notes 84-94 *infra*.

62. 310 U.S. 88 (1940).

63. *Id.* at 101-02.

64. 385 U.S. 374 (1967).

ment upon public affairs, still required first amendment protection.⁶⁵ Justice Brennan had no trouble finding that the opening of a new play, based in part on an actual incident, was a matter of public interest. Justice Douglas concurred and pointed out that the members of the Hill family had no control over the events; rather, he noted, they were catapulted into the news. As a result, their activities became part of the public domain, and where the discussion concerns matters in the public domain, action to abridge freedom of the press is barred by the first amendment.

Justice Harlan took a narrower view of the concept of "public." He argued that "where private actions are involved the social interest in individual protection from falsity may be substantial."⁶⁶ He did not see the "market place of ideas" functioning here as in *Sullivan*, where the public had an "independent interest in the qualifications and performance" of those who held government positions.⁶⁷ Hill had not voluntarily entered the public's attention and had no means of effective reply. Justice Harlan would have remanded for retrial.

Justice Fortas, in his dissent with the Chief Justice and Justice Clark, thought the majority opinion ignored the fundamental right to privacy set forth in the famous Warren-Brandeis article, *The Right To Privacy*,⁶⁸ and Justice Brandeis' dissent in *Olmstead v. United States*.⁶⁹ They granted that "where political personalities or issues are involved or where the event . . . is in itself a matter of current public interest" there should be protection conferred by *Sullivan*, but the first amendment did not protect areas outside. The *Life* story, the dissenting Justices felt, did not deal with a matter of public interest; therefore, the state should be permitted to offer a remedy.⁷⁰

The intention of the public speech theory was to reach beyond the political arena. All areas considered necessary to the public's understanding and discussion of ideas requires first amendment protection. By extending protection to *Life* magazine against an individual who was thrust unwillingly into the public sector, the Court incorporated Meiklejohn's first amendment theory, though,

65. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 388 (quoting *Thornhill v. Alabama*, 310 U.S. at 102).

66. 385 U.S. at 405 (Harlan, J., concurring in part and dissenting in part).

67. *Id.* at 407.

68. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 191 (1890).

69. 277 U.S. 438, 478 (1928).

70. 385 U.S. at 415 (Fortas, J., dissenting).

it had not yet completely elaborated on the problem of distinguishing between public and private.

The divisions over the public-private issue were magnified in *Rosenbloom v. Metromedia, Inc.*⁷¹ In a plurality opinion, Justice Brennan continued the line of reasoning begun in *Sullivan* that the general citizenry had a legitimate and substantial interest in persons other than public officials, and extended his first amendment argument one step further.⁷² "[T]he constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government. '[T]he Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government.'"⁷³ Though this was not to say that everything was public, he did argue that "we are all 'public' men to some degree."⁷⁴ The test became whether the matter was a subject of public or general interest; a private individual's involvement did not reduce the public's interest in the event or reduce first amendment protection.

Justice White, concurring in *Rosenbloom*, felt that Justice Brennan had struck too hard at state libel laws and that more solid first amendment grounds were needed.⁷⁵ Justice Harlan, as in *Time, Inc. v. Hill*, urged the Court to distinguish between privacy rights and the rights of public figures. This, he said, was an even clearer case of a private individual and again he emphasized the public figures' access to media, arguing that a reasonable care standard should be imposed on the press.

Dissenting, Justice Marshall argued that Justice Brennan had failed to provide a standard or guidelines to decide what was "public" or within the area of public or general concern.⁷⁶ The dis-

71. 403 U.S. 29 (1970).

72. Rosenbloom, the operator of a newstand, was arrested for allegedly selling obscene material. Following his arrest, a radio station carried reports which characterized Rosenbloom as a "smut merchant" and "girlie-book peddler." In a defamation suit, Rosenbloom was awarded \$50,000 in punitive damages, later reduced by the Court of Appeals. The Supreme Court overturned the libel verdict. *Id.*

Prior to the Supreme Court's decision in *Rosenbloom*, federal and state courts had extended the *Sullivan* rule beyond public figures and officials to cover matters of public interest and concern. See *Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970); *Bon Air Hotel, Inc. v. Time, Inc.* 426 F.2d 858 (5th Cir. 1970); *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970), *Arizona Biochemical Co. v. Hearst Corp.*, 302 F. Supp. 412 (S.D.N.Y. 1969); *Bishop v. Wometco Enterprises, Inc.*, 235 So. 2d 759 (Fla. 3d Dist. 1970); *Fannsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

73. 403 U.S. at 42 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967) (Harlan, J.)).

74. *Id.* at 48.

75. *Id.* at 60.

76. *Id.* at 79.

sent claimed that the test articulated by Justice Brennan would have to be considered on a case by case basis, and would result in unpredictability and uncertainty since courts would be performing an ad hoc balancing. Justice Marshall thought this method would threaten both privacy and first amendment principles.

Justice Brennan's test is the appropriate standard to apply in a copyright problem. With the Meiklejohn approach, the court's concern should be with the matter copyrighted and not with balancing the interests represented by copyright and the first amendment. If a matter is of general public concern and a copyright holder is limiting access through his copyright, the first amendment should be a defense to any alleged infringement if someone uses the copyrighted material.

It is apparent that the Court was split by the problem of public versus private and it retreated somewhat in *Gertz v. Robert Welch, Inc.*⁷⁷ from its position in *Rosenbloom*. The issue the Court considered was "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."⁷⁸ On facts similar to *Rosenbloom*, the Court attempted to eliminate the confusion.

Justice Powell balanced the interests: the value of self-censorship of the news media against the state's interest in compensating individuals for the harm inflicted by defamatory falsehood. He concluded that the state interest won, thus refusing to extend the *Sullivan* rule. The Court held that a different rule should apply with respect to compensating injury to the reputation of private individuals. The standard was left to the states provided they did not impose on the news media a standard of liability without fault.⁷⁹

77. 418 U.S. 323 (1974). Gertz was a reputable attorney retained by a Chicago couple to represent them in civil litigation against a policeman who had shot and killed their son. The defendants published the *American Opinion*, a monthly publication of the John Birch Society. This magazine focused on what they viewed as a nationwide conspiracy to discredit local law enforcement agencies and, as part of their continuing effort to alert the public, they wrote an article on the civil trial entitled: *Frame Up: Richard Nuccio and the War on Police*, AM. OPINION (Mar. 1968).

Although Gertz was only remotely connected with the policeman's prosecution, he was portrayed in the article as the architect of the "frame-up." The article also stated that Gertz had been a member of an organization that advocated the violent seizure of the government, and labeled Gertz a "Leninist" and a "Communist fronter." In plaintiff's defamation action, defendant sought to invoke the privilege enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

78. 418 U.S. at 332.

79. *Id.* at 347.

The underlying rationale for the Court's move away from the *Sullivan* standard of "malice or reckless disregard" may be explained by its concern for the private individual. In contrast with a public figure, who has access to the channels of communication thereby permitting him to contradict what has been said about him and, most importantly, who has purposely placed himself in the public view, the private individual is powerless and unassuming. Therefore, the private individual is entitled to greater protection.

The Court attempted to clarify the problem by defining "public figure" in the following standard:

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.⁸⁰

In *Gertz*, the Supreme Court permitted states to apply a negligence standard when considering defamation allegations by those who did not meet the above criteria.

Justice Brennan argued in *Rosenbloom* that whether the subject was a matter of public or general concern should be the applicable test in deciding to apply the *Sullivan* standard. Justice Powell considered this test in defining "public figure" but contended that the "instances of truly involuntary public figures must be exceedingly rare." In other words, there may be times when a subject is of sufficient public or general concern to elevate a private individual to the level of a public figure. *Gertz*'s involvement in the trial was not sufficient, according to Justice Powell, though Justice Brennan, in dissent, argued that on the facts, the publisher of the article was involved in a matter of public interest and therefore fell within the *Sullivan* standard. Justice Powell's opinion was not a rejection

80. *Id.* at 344-45.

of *Rosenbloom*; rather, the Court was focusing on the individual defamed instead of the event or subject.

This focus on the individual was extended by Justice Rehnquist in *Time, Inc. v. Firestone*,⁸¹ where he adopted the *Gertz* standard to define "public figure." He concluded that Mary Alice Firestone was not a public figure within the *Gertz* definition. In reaching his conclusion he rejected the argument of *Time, Inc.* that the divorce proceedings were a "cause celebre," a public controversy, and therefore respondent must be considered a public figure. Justice Rehnquist refused to equate "public controversy" with all controversies of public interest. In other words, these particular events were not sufficient to raise respondent to the level of a public figure.

Justice Rehnquist, in analyzing Alice Firestone's position, first examined her as an individual and then looked to the event to determine if she were a public figure. In concluding that Mrs. Firestone was not a public figure, Justice Rehnquist did not reject the *Rosenbloom* plurality's test, but he did narrow its scope by refusing to extend the first amendment to all events of public interest. Thus, the implication was raised that only certain public controversies were absolutely protected. What those controversies might be remains an open question.

The underlying access-to-ideas premise of *New York Times Co. v. Sullivan*, taken from Meiklejohn's theory, has remained consistent throughout the cases. The breadth of its application has arguably been reduced in recent years, though it provides absolute protection, absent malice, against all public figures and public officials. The matters most concerned with self-government are protected, though in light of *Gertz* and *Firestone*, it might be more difficult to expand into other areas.

To summarize, the appropriate test to apply to copyright is the plurality *Rosenbloom* standard articulated by Justice Brennan. Constitutional protection should be extended to all discussion and communication involving matters of public or general concern.⁸²

81. 424 U.S. 448 (1976). Respondent, Mary Alice Firestone, married Russell Firestone, an heir to one of America's wealthiest industrial families. They were separated in 1964, and subsequently a divorce was filed. The activities of the couple were sufficient for the Circuit Court of Palm Beach, Florida, to dissolve the marriage. The editorial staff of *Time* magazine was alerted to the fact that judgment had been rendered and gathered information from four sources. On this basis, a small item appeared in the "Milestones" section of the magazine. One section read: "The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'" *Id.* at 452. When *Time* refused to issue a requested retraction, respondent filed a libel action against petitioner in the Florida state court.

82. For an excellent discussion of the status of public figures after *Time, Inc. v. Firestone*, see Bamberger, *Public Figures and the Law of Libel: A Concept in Search of A*

This protection is at the core of the public speech theory and goes to the heart of the second part of the standard suggested here. First amendment protection should be a defense against alleged copyright infringements where the matter's accessibility has been limited, and it is a matter of general or public concern.

The Court, in considering private individuals in both *Gertz* and *Firestone*, went through the two-tier process to determine the status of the individual and the type of protection to be given the publishing entity. The focus was on the individual rather than the event in which the individual was involved, but the Court still used the *Rosenbloom* plurality test in the second part of its analysis. First, the Court asked if the individual met the definition of public figure; and second, it examined his activities and asked whether it was a matter of sufficient public concern to raise the individual to the level of a public figure.

In *Gertz*, the Court concluded that the *Sullivan* rule was inapplicable because Gertz himself was not a public figure. In *Firestone*, Mary Alice Firestone was also held not to be a public figure. Justice Rehnquist's rejection of the *Sullivan* rule restricts the *Rosenbloom* plurality test, since it limits what is of public interest. It left intact those interests that are most important to self-government. What now remains open is the question of what other matters will be considered of public interest. One may look to the commercial advertising cases for guidance.

C. The Commercial Advertising Cases

The commercial advertising decisions are further evidence of the acceptance of the public speech theory as a strong, viable first amendment rationale. The Supreme Court adopts Meiklejohn's argument that the government has no authority to determine what its citizens read or see, regardless of whether it is a political issue vital to self-government.

The first commercial advertising case to move toward this position was *Bigelow v. Virginia*,⁸³ wherein a Virginia newspaper announced the availability of abortions in New York. The advertisement was published in violation of a Virginia statute that made it a misdemeanor for any publication to encourage or prompt the procuring of an abortion. The Court held the statute to be a clear violation of the newspaper editor's first amendment rights.⁸⁴

Definition, 33 BUS. LAW. 709 (1978). For the various areas where individuals have been found to be public figures see cases cited in *id.* app., at 725.

83. 421 U.S. 809 (1975).

84. The Court noted:

Further extension in the commercial advertising area, apart from political issues, occurred in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁸⁵ wherein consumers attacked on first amendment grounds a statute making it a misdemeanor to advertise prescription drugs. In holding the statute unconstitutional, the district court initially noted that *Valentine v. Chrestensen*,⁸⁶ which had long been cited for the proposition that commercial speech does not warrant first amendment protection, had been tempered by later decisions holding that the first amendment interest of free flow of price information could outweigh the countervailing interests of health, safety and welfare.

The Court noted that the subject in *Bigelow* (abortion) was a matter of "public interest," while here the subject was purely commercial. Nonetheless, the Court extended first amendment protection recognizing the consumer's interest in such information: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen if not keener by far, than his interest in the day's most urgent political debate."⁸⁷ The Court recognized that even though an individual advertisement is entirely "commercial," it may be of general public interest, thus making the link to *Bigelow* and the *Rosenbloom* plurality opinion where the subject matter, as a matter of public or general concern, raised it to the level of first amendment protection. The focus has returned to the subject matter, and in this manner the public speech theory has been extended; access to information of general interest is the important issue. Whether there is a question of public political concern is now only of minor interest.

The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest"

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the service offered, but also to those with a general curiosity about, or genuine interest in the subject matter or law of another state

Id. at 822.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court wrote: "[T]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.'" *Id.* at 150.

Abortion was, and is, an important political issue, and, thus, *Bigelow* cannot be viewed as a great extension of the public speech theory. Commercial advertising, however, previously had been considered outside the first amendment. The Court's opinion here was to encourage dissemination of information to the public.

85. 425 U.S. 748 (1976).

86. 316 U.S. 52 (1942).

87. 425 U.S. at 763.

The first amendment, according to *Virginia Pharmacy*, offers protection to all information that the public might use in its decisionmaking process—whether political or economic.⁸⁸ Constitutionally, it appeared that the first amendment offered protection to any information that, properly disseminated, would aid the consumer in making a decision. This contention was so strong that the Court, in *Bates v. State Bar of Arizona*,⁸⁹ extended it to attorney advertising—a field in which advertising had been tightly circumscribed. The Court found that a state “disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance. Because of the possibility, however, that the differences among professions might bring different constitutional considerations into play, we specifically reserved judgment as to other professions.”⁹⁰

The Court considered the following problems associated with attorney advertising: (1) the adverse effect on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the adverse effect on the administration of justice; (4) the undesirable economic effects of advertising; (5) the adverse effect of advertising on the quality of service; and (6) the difficulties of enforcement. It concluded that the above reasons were insufficient to suppress all advertising by attorneys, and found the disciplinary rule violative of the first amendment since “the flow of such information may not be restrained.”⁹¹

The *Sullivan* and commercial advertising cases indicate that the “public speech theory” advocated by Alexander Meiklejohn is an accepted and viable method for the Court to use in handling first amendment problems in certain areas. These cases are concerned with information reaching the public—an area of sufficient import that the Court has guaranteed dissemination by offering first amendment protection.

D. *The Standard Applied*

A copyright holder has an exclusive proprietary interest, sub-

88. The Court cited to Meiklejohn, *Id.* at 765 n.19.

89. 433 U.S. 350 (1977). Bates and his partner O'Steen were attorneys licensed in Arizona. They set up a “legal clinic” to provide services to moderate income groups and, since they had a low return on their work, they relied on volume to survive. After two years, they realized that the only way to stay in business was to advertise, which they did in the *Arizona Republic*. This violated disciplinary rule 2-101(B) of the Arizona Supreme Court, which prohibited attorneys from in any way publicizing themselves or their services. 17A ARIZ. REV. STAT. Rule 29(a) (Supp. 1976).

90. 433 U.S. at 365.

91. *Id.* at 384.

ject to some exceptions. If the copyright holder through his property right makes information inaccessible to the public, a court is confronted with the same dilemma considered in the above cases. If the information is made available by someone other than the copyright holder, should a subsequent infringement action be upheld, or should the court permit a first amendment defense? The Supreme Court has dealt with these considerations in the past. Newspapers require protection so they can publish without fear of suit. People are permitted to advertise, disseminating information to the public, despite state interests and concerns. In each instance, the first amendment has shifted the balance to favor accessibility of information.

Therefore, the rule the courts should apply to a copyright and first amendment conflict is as follows: *An alleged infringer cannot be held liable for disseminating information when the copyright holder, through the proprietary right he has obtained, limits access to information or to matters that are of public or general concern.* In this rule, which is supported by the cases discussed above, first amendment interests may override copyright considerations. The rule itself balances copyright interests (including economic and creative incentives) against the first amendment (rights to speak and to hear). In the first decision to take such an approach, Judge King of the United States District Court for the Southern District of Florida wrote: "When the Copyright Act and the First Amendment both seek the same objective, their future coexistence is easily assured. However, when they operate at cross-purposes, the primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation."⁹²

It is this author's contention that the above standard provides a more concrete approach for handling conflicts between copyright and the first amendment. To demonstrate its validity, it will be contrasted with the tests developed by two authorities in the copyright field, Melville Nimmer and Paul Goldstein.

IV. ROOTS OF THE CONFLICT

A. Melville Nimmer

In several articles⁹³ and a noted treatise,⁹⁴ Melville Nimmer,

92. *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 876, 882 (S.D. Fla. 1978).

93. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); Nimmer, *Copyright and the First Amendment*, 17 BULL. COPYRIGHT SOC'Y 255 (1970).

94. 1 M. NIMMER, *supra* note 11.

recognizing the implicit conflict between copyright and the first amendment, offers a "definitional balancing" test as a possible solution. It is a balancing of speech and nonspeech interests to determine which forms are to be regarded as "speech" within the meaning of the first amendment.⁹⁵ Nimmer points to *New York Times Co. v. Sullivan*⁹⁶ as an example of the Court drawing a definitional line; some defamatory speech is "speech" within the meaning of the first amendment, while some is not.⁹⁷

In order to apply this approach in copyright, "it is necessary to draw a line between that speech which may be prohibited under the copyright law, and that speech which, despite its copyright status, may not be abridged under the command of the first amendment."⁹⁸ This requires a balancing of the opposing interests because copyright grants a limited monopoly to authors on the dual premise that the public benefits from their creative activities and that such a monopoly is necessary to stimulate such activities. The reasons for the first amendment are obvious and represent an important part of our national ethos. The conflicting interests must be accommodated in a definitional balance. Nimmer writes:

On the copyright side, economic encouragement for creators must be preserved and the privacy of unpublished works recognized. Freedom of speech requires the preservation of a meaningful public or democratic dialogue, as well as the uses of speech as a safety valve against violent acts, and as an end itself.⁹⁹

Nimmer's proposed balance is based on the idea-expression dichotomy. Ideas cannot be protected by copyright; expression of those ideas can be so protected. Under this definitional balance, ideas fall on the free speech side of the line while expression, including selection and arrangement of ideas, is on the copyright side. Nimmer argues that the definitional balance is defensible because ideas are vital elements to a democratic dialogue. Copying the expression of an idea, however, will not add to the maintenance of the so-called "democratic dialogue" or the "market-place of ideas." Thus, copying would fall on the copyright side of the line, and its prohibition ensures the public benefit that follows from the positive force to be creative.

Nimmer also considers some situations where the idea-expression dichotomy fails. One such area is where the expression

95. *See id.* § 1.10[A], 1-67.

96. 376 U.S. 254 (1964).

97. 1 M. NIMMER, *supra* note 11, § 1.10[A], at 1-67.

98. *Id.*

99. *Id.* § 1.10[B][1], at 1-72.

may be far more important than the idea; for example, graphic works or Nimmer's example of photographs of the My-Lai massacre.¹⁰⁰ Words could not describe the "idea" of the massacre nor substitute for the public insight gained through the photographs. Nimmer admits his definitional balance fails, but at the same time finds it intolerable that the full meaning of My-Lai could be censored by the copyright holder of the photograph.

The test proposed herein, however, would simplify analysis and solution of this problem. Since the photographs are of public interest and concern, were there to be a limitation on their access, the first amendment interests would out-balance copyright protection.

Another example is the case of *Time, Inc. v. Bernard Geis Associates*,¹⁰¹ involving the Zapruder home movie films of the John F. Kennedy assassination. Time, Inc., purchased the films from Zapruder and properly registered them under the copyright statute. Time refused to permit Thompson, the author of a book expounding a theory of the assassination, the use of the film. He managed to reproduce and then to publish them, and Time brought an action for infringement of its statutory copyright. Defendants raised the first amendment as an affirmative defense, but the case was ultimately decided under the doctrine of fair use.¹⁰²

The defendant's right to copy was permitted on the grounds that there was a "public interest in having the fullest information available on the murder of President Kennedy."¹⁰³ Again, Nimmer's idea-expression dichotomy would fail, while the two-pronged test advocated herein would produce the desired result.

Nimmer speculates on how to generalize from the My-Lai and Zapruder film situations, which fall on the free speech side of the line, to those graphic works that should retain copyright protection. He points out that "[g]raphic works per se should not be deprived of full copyright protection."¹⁰⁴ Nimmer would limit this category of expression to news photographs. Yet, rather than attempting to create exceptions and categories, a more reliable test is needed. There may be other photographs or graphic works besides news photos that should be accessible to the public. Applying the suggested two-pronged test of limitation on accessibility, with the requisite public interest or concern eliminates the need for artificial categories. Although the result under the two tests may be the same,

100. *Id.* § 1.10[C][2], at 1-82.

101. 293 F. Supp. 130 (S.D.N.Y. 1968).

102. Fair use has now become a statutory defense. 17 U.S.C.A. § 107 (1977).

103. 293 F. Supp. at 146.

104. 1 M. NIMMER, *supra* note 11, § 1.10[C][2], at 1-83.

rather than attempting to create arbitrary categories, the courts can rely on a concrete standard in resolving a conflict between the first amendment and copyright.

Nimmer also discusses what he considers to be unjustified balancing in favor of free speech, pointing to *Rosemont Enterprises, Inc. v. Random House, Inc.*¹⁰⁵ His concern is that fair use and the first amendment will legitimize wholesale amputation in vital copyright areas.¹⁰⁶ He writes: "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The first amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is thereby impaired."¹⁰⁷ Nimmer chose the first tack in analyzing *Rosemont Enterprises*, after concluding that free speech elements were absent. In that case, Random House published *Howard Hughes—a Biography*, by John Keats. Keats, who revised an earlier author's manuscript, relied heavily on previously published newspaper and magazine articles, including articles published in *Look* magazine in 1954, for information on the recluse millionaire. Three days before the book was published, Rosemont Enterprises, a Hughes corporation, purchased the copyrights from *Look*, advised Random House of its holdings and five days later brought an action for a preliminary injunction. The facts indicate that the purchase was intended to prevent access, not only to this material, but to the book as well. The court reversed the district court's granting of a preliminary injunction on the grounds of fair use. Nimmer believes the court wrongly decided the case. It is argued here that the correct result was reached, though the rationale should have been based on first amendment grounds.

Nimmer distinguishes *Rosemont Enterprises* from *Geis* because Keats had copied some of the actual expression used in the *Look* articles. Returning to his expression-idea dichotomy, Nimmer argues that the "value of such labor-saving utility is far outweighed by the copyright interest in encouraging creation by protecting expression."¹⁰⁸ He would have permitted copying of the ideas, but the copying of expression took it out of fair use, thus precluding any first amendment question.

The issue of copying was not central in the case. *Look* had no intention of bringing suit for copyright infringement so it is difficult to accept an argument that the interest in encouraging creation

105. 366 F.2d 303 (2d Cir. 1966).

106. 1 M. NIMMER, *supra* note 11, § 1.10[D].

107. *Id.*

108. *Id.*

would be hindered, since the creator had no intention to enforce its rights.

The intention of Rosemont Enterprises in purchasing the copyright was to prevent access to information that was of potential public interest. The court took note of Hughes' notoriety:

By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person endowed with extraordinary talents [A] narration . . . ought to be available to a reading public which, even in an affluent society, might well be reminded that affluence usually comes from the work of such entrepreneurs in business and industry.

. . . [W]hen one enters the public arena to the extent that he has, the right of privacy must be tempered by a countervailing privilege that the public have some information concerning important public figures.

. . . [T]he public interest should prevail over the possible damage to the copyright owner.¹⁰⁹

The facts here lend themselves perfectly to the application of the standard proposed in section III. There was an attempt by the copyright holder to limit access to a subject that was of public concern and interest. The court recognized this, but only Chief Judge Lumbard squarely addressed the problem:

The spirit of the first amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.¹¹⁰

First amendment interests should have outweighed the copyright interests in that case. Copyright law does not preclude one from using and copying portions of an earlier author's work. In other areas, like statistical studies or cases with actual dialogue, there might be a need to copy. Nevertheless, where the first amendment interests are substantial, regardless of whether ideas or expression is copied, there should be no liability for an alleged copyright infringement.

B. Paul Goldstein

In his oft-quoted article¹¹¹ on copyright Paul Goldstein ap-

109. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d at 309. Note that Hughes was considered the copyright owner in this instance.

110. *Id.* at 311 (Lumbard, C.J., concurring).

111. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

proaches the problem quite differently than Nimmer. He begins by focusing on the factual setting of *Rosemont Enterprises, Inc. v. Random House, Inc.*¹¹² as a practical setting for his discussion. His analytical framework is that artistic expression is the subject of two types of monopoly, "statutory and enterprise."¹¹³ The statutory monopoly is represented by the Rosemont claim that the *Look* copyrights, which were based on compliance with the Copyright Act, had been infringed. Statutory monopoly involves the tensions between the Copyright Act and freedom of speech. The enterprise monopoly is represented by the attempted aggregation of copyrighted articles devoted to the life of Howard Hughes.

Goldstein's test involves a balancing of the competing interests of free speech and copyright. He attempts to identify methods for reconciling the competing interests and develops what he calls accommodative principles, the first of which

requires that copyright infringement be excused if the subject matter of the infringed material is relevant to the public interest and the appropriator's use of the material independently advances the public interest. The *second accommodative principle* requires that only "original" literary property be protected against unauthorized use, that actual damages be demonstrated by the plaintiff, and that the granting of legal, not equitable, relief be the general rule when the plaintiff prevails.¹¹⁴

Goldstein's thesis is that a balance must be struck between the copyright holder's property interest and the public interest. This balancing, though, should not be necessary for reaching a decision. The Court has demonstrated that in areas of public concern the first amendment will generally override any considerations or other interests.¹¹⁵ Generally, the courts need only determine whether the first amendment is a defense for the infringer: whether access has been limited by the copyright holder and whether the information is in the public interest.

Goldstein's major premise is similar to that advocated here—the challenged use, to be excused, must operate to advance the public interest.¹¹⁶ Goldstein, at the time he wrote his article, was

112. 366 F.2d 303 (2d Cir. 1966); see notes 105-110 *supra*.

113. See Goldstein, *supra* note 111, at 985-86.

114. Goldstein, *supra* note 111, at 988.

115. It is recognized that the Court has generally balanced competing interests when it was considering application of the first amendment in the cases discussed in section III of the text. In every instance where the subject was a matter of public interest, the first amendment prevailed. The courts should simply look to see if the subject of the copyright infringement is of public concern.

116. Goldstein, *supra* note 111, at 995.

limited to *New York Times Co. v. Sullivan* and *Time, Inc. v. Hill*. The Court, as indicated in section III, has decided several cases since then and has further defined what it considers to be of "public interest or concern."¹¹⁷ These cases make it possible to arrive at a definite standard, as opposed to Goldstein's awkward property analysis.

His property interest is represented by the misappropriation doctrine established in *International News Service v. Associated Press*.¹¹⁸ Goldstein claims there is an affirmative first amendment rationale for the government's grant of copyright monopolies because it encourages the creation of works for public dissemination.¹¹⁹

Goldstein's second accommodative principle requires that only original property be protected from infringement and that an infringement suit lie only when there is actual economic injury. The Court, in *International News Service*, focused on these two points. It gave recognition to the plaintiff's property interest in the collection of its news releases and found the misappropriation by the defendant actionable to the extent that it prejudiced plaintiff's economic position. Goldstein indicates that the majority's affirmance of the lower court's injunction was improper, and, as Justice Brandeis suggested in his dissent,¹²⁰ the exclusive remedy should have been merely damages. This represents what Goldstein views as an acceptable balance between "plaintiff's economic integrity as well as broad public participation in expression."¹²¹

The majority in *International News Service*, affirmed on the grounds that plaintiff was entitled to protection of its "right to acquire property by honest labor or the conduct of a lawful busi-

117. See section III A *supra*.

118. 248 U.S. 215 (1918). The Associated Press (AP) had asked for an injunction to restrain the International News Service from stealing AP news in three ways:

[f]irst, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

Id. at 231.

The AP alleged that it cost about \$3.5 million annually to gather the news and to distribute it to its customers and claimed a property right in the news itself. The news matter was not, of course, copyrighted. The district court granted a preliminary injunction on the first two counts of the complaint; the court of appeals sustained the injunction. The Supreme Court affirmed, holding that the AP did, in fact, have a property right. *Id.* at 237-42.

119. Goldstein, *supra* note 111, at 995.

120. 248 U.S. at 248-67 (Brandeis, J., dissenting).

121. Goldstein, *supra* note 111, at 999.

ness.”¹²² The Court simply shunted aside any first amendment considerations and viewed the case simply as the misappropriation of another’s labors. Goldstein views it as an accidental but acceptable example of balancing both property rights and economic interest. Justice Brandeis, however, recognized the first amendment implications of the majority’s action: “The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas.”¹²³

About 400 newspapers throughout the country relied exclusively on the International News Service (INS) for news of the war in Europe. When INS offices were closed by foreign governments, the readers of those newspapers were suddenly deprived of news of vital public interest or concern. The net result, therefore, was that the Associated Press (AP) had limited access of the news to its customers, though it is doubtful whether the AP was actually harmed by the actions of INS, since AP customers still had to pay for the news bulletins that AP distributed. In fact, the AP member newspapers were probably delighted to see its competition without the important news from Europe. In this context, the first amendment guaranties of the public’s right to know would far outweigh any property rights under the standard advocated here.

After presenting his analytical framework, Goldstein discusses the various permitted uses of copyrighted material—statutory permission,¹²⁴ fair use¹²⁵ and, the most important, private standing to assert the public interest.¹²⁶ Goldstein points out that a court allowing a fair use defense permits the user’s isolated economic interest to prevail in order to broaden public access to expression. The infringer is thereby given standing to assert that public interest. The test, in the context of the second accommodative principle, “requires that the accused infringer be exonerated if he can demonstrate that the property used by him is the object of a compelling public interest and, at the same time, that its sacrifice will not unduly prejudice the copyright owner.”¹²⁷

122. 248 U.S. at 236.

123. 248 U.S. at 263. (Brandeis, J., dissenting).

124. Goldstein, *supra* note 111, at 1010.

125. *Id.* at 1011. See also section II *supra*.

126. Goldstein, *supra* note 111, at 1014.

127. *Id.* at 1015. The method of the second accommodative principle is to distinguish in any protected work those components which are the subject of a compelling public interest from those whose protection create economic incentive in the author. This critical distinction is maintained internally by the statutory requirement that only original works may be copyrighted and is externally manifested in the requirement that the copyright interest be thoroughly elastic. Goldstein, *supra* note 111, at 1016.

This test is objectionable on two grounds. First, the most recent cases evince a broadening perspective of public interest and "compelling" should not be a criterion. Second, the copyright owner's economic considerations are irrelevant if he is limiting access to the information. If he has not limited access, the infringer's use should not be permitted with the copyright holder recovering damages equal to the economic benefit gained by the user. If access to information has been limited by the copyright owner, even though the infringer may cause some economic harm, there should be no liability.¹²⁸

Goldstein defines elasticity to mean "that as the legitimacy of the public interest in participation increases, so the property interest protected by copyright ought correspondingly to diminish."¹²⁹ The framework of his elasticity doctrine is the idea-expression dichotomy. It is apparent from Nimmer's discussion that there are serious shortcomings with this doctrine. This is particularly disturbing since both authors are using it to determine the extent of copyright protection. Ideas cannot be protected, but the expression of those ideas can be protected, and "the more an idea assumes expressive proportions the more extensive is the right accorded it."¹³⁰ Again, how should one treat photographs or other works of art? Goldstein's theory is based on a balancing of the copyright interests against the first amendment. In setting up his framework, he balances property rights and economic incentives against the interest of the public in gaining access to information. Determining the extent of the property interest depends in the end on the outcome of the idea-expression dichotomy. A court, therefore, must make a series of value judgments and balancings to reach a conclusion. As with Nimmer's framework, the idea-expression dichotomy would not adequately satisfy all situations. Therefore, a more acceptable test is the standard proposed here and supported by recent decisions discussed below.

C. The Recent Decisions

*Meeropol v. Nizer*¹³¹ and *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*,¹³² are two recent cases that offer the opportunity to demonstrate the weaknesses and strengths of the stan-

128. This final category would probably be included in the new statutory definition of fair use. See 17 U.S.C.A. § 107 (1977).

129. Goldstein, *supra* note 111, at 1016.

130. *Id.* at 1018.

131. 560 F.2d 1061 (2d Cir. 1977).

132. 445 F. Supp. 875 (S.D. Fla. 1978).

dards of analysis for first amendment and copyright problems.

In *Meeropol*, plaintiffs were the natural children of Julius and Ethel Rosenberg, who were executed in 1953 after conviction for conspiring to transmit United States defense secrets to the Soviet Union. Louis Nizer, their attorney, wrote *The Implosion Conspiracy*, an account of the events surrounding the Rosenberg trial. The book contained verbatim portions of twenty-eight copyrighted letters written by Julius and Ethel Rosenberg. Since Nizer had obtained no authorization, use of the letters constituted the alleged copyright infringement on both statutory and common law grounds.

The district court in *Meeropol* granted summary judgment for defendants based on a fair use defense.¹³³ The court of appeals, however, reversed, finding that fair use could not be found as a matter of law and that factual questions were at issue.¹³⁴

The court of appeals listed a four factors framework within which it would analyze whether the use was a fair one: (1) the purpose and character of the use (scholarly or commercial); (2) the nature of the copyrighted work; (3) the amount of the work used; and (4) the effect of the use on the potential market of the copyrighted material.¹³⁵ The court focused on the fourth factor in its reversal of summary judgment. A key factual issue remained as to whether the publication of twenty-year old letters in *The Implosion Conspiracy* prejudiced the plaintiffs' potential market in the letters.¹³⁶

The *Meeropol* case is an interesting example of how, alternatively, the first amendment would constitute a complete defense to the alleged copyright infringement. Application of the various tests advocated in this comment could offer some insight as to the role of each in an actual conflict.

First, it should be established that the Rosenbergs were unquestionably public figures since their trial was the subject of public interest, and their letters would presumably be of equal interest. Second, the letters had been out of print for twenty years and, arguably, their accessibility was limited. For the purposes of discussion, assume that authorization had been requested and denied by the children.

Under Nimmer's test, the idea-expression dichotomy, personal letters would provide an exception. The expression in the letters

133. *Meeropol v. Nizer*, 417 F. Supp. 1201 (S.D.N.Y. 1977).

134. 560 F.2d 1061 (2d Cir. 1977).

135. *Id.* at 1069.

136. *Id.* at 1070.

(requiring verbatim copying), as opposed to the ideas, would be essential to their effectiveness. A court would then have to balance access against the economic incentives of copyright, probably requiring difficult factfinding procedures. Thus, the idea-expression definitional balancing test would be cumbersome, at best.

Goldstein's test, which also focuses on the idea-expression relationship, requires the object in dispute to be of compelling public interest, while not unduly prejudicing the copyright owner. The court would largely be repeating the various balancing tests discussed above. There would be some question as to whether these letters or events, twenty-five years after they had occurred, would be considered compelling. Also, because of the concern of the economic interests, there would again have to be a determination and factfinding on any possible economic damage.

Under the standard proposed herein, resolution of the case would be relatively easy and unburdened by uncertain balancing tests. Two threshold determinations would be made. First, plaintiff's refusal to permit the use of letters that have been out of print would constitute limitation on access. Second, the historical significance of the letters would constitute a matter of public interest.¹³⁷ With these first amendment criteria satisfied, the intrinsic economic claim in copyright *need not be considered*.

The property right question may be ignored in this particular instance because the plaintiffs were using the copyright laws in a manner inconsistent with the policy underlying those laws in that they were attempting to prevent the dissemination of matter important to the public interest. The purpose of copyright is to provide economic incentives to the creators of original works. Copyright enables the Rosenberg children to use the historically significant letters in a commercially beneficial fashion, but not necessarily to cut off their availability to the public. Therefore, since it may be argued that the plaintiffs' withholding of the letters from the public was in contradiction to the policy of the copyright laws to provide economic incentives, this incentive structure would not be upset by a successful first amendment defense.

Triangle Publications was the first case to be decided using the first amendment as the legal rationale for finding no infringement of a copyright.¹³⁸ The defendant was Knight-Ridder. One of its news-

137. A right to privacy issue will often coincide with the determination of what is a matter of public interest. For a discussion of the court's rejection of the privacy claim in *Meeropol*, see 560 F.2d at 1066-68.

138. Judge King recognized this by noting: "This case presents an issue of first impression in this nation." 445 F. Supp. at 876.

papers, *The Miami Herald*, had developed a new supplement for its Sunday editions, a so-called T.V. book, containing listings for the week's television shows together with articles related to television programming. Triangle Publications, meanwhile, was publisher of the highly visible and successful *TV Guide*, which exhibited a similar format and was sold at newsstands. The *Herald*, in promoting its new supplement, used the technique of comparative television advertising. In one commercial feature, the commercial visually identified the competing product, *TV Guide*, for a few seconds, and urged the viewer to purchase the Sunday *Herald* television supplement instead. Plaintiff complained that defendant utilized a copyrighted item without plaintiff's permission and sought an injunction. A preliminary injunction was dismissed and, following the discussion of three issues, the permanent injunction was denied as well.¹³⁹

In its defense, the *Herald* argued that fair use, as embodied in the new copyright law that was barely a month old, was designed to permit criticism, literary or otherwise, of a work submitted for public consumption. The court found that case law compelled the conclusion that the criticism exception was developed for literary and cinematic reviews—not commercial critiques that appear in everyday television advertisements.¹⁴⁰

The court relied on *Bates v. State Bar of Arizona*,¹⁴¹ the legal advertising case which extended first amendment protection to commercial speech. Since the plaintiff in *Triangle Publications* sought to enjoin a form of speech by use of copyright, there arose again a fundamental conflict between copyright and the first amendment.¹⁴²

Judge King's analysis paralleled the standard suggested in section III. He rejected plaintiff's economic arguments that the Act was designed to protect the creator's work from all "deleterious competitive effects."¹⁴³ Judge King pointed out that the authors of the Act

139. The threshold issue, not discussed within this comment, was whether a magazine cover is protected under a copyright granted to the creator of the magazine. See 445 F. Supp. at 878-79. The court held that the cover could, in fact, be protected. *Id.*

140. *Id.* at 879-81.

141. 433 U.S. 350 (1977).

142. Judge King, in considering comparative advertising, wrote:

The comparative advertising at issue here was clearly undertaken to inform the public that they should purchase the Miami Herald TV supplement rather than buy TV Guide because it provides more value for the money. Such comparative advertising, when undertaken in the serious manner that defendant did herein, represents an important source of information for the education of consumers in a free enterprise system.

445 F. Supp. at 883.

143. *Id.* (quoting 23 A.L.R.3d 139, 190 (1967)).

did not center on the disadvantage which arises from the perceived commercial superiority of a product Rather, the deleterious effect which the Act seeks to avert is that which accompanies the reproduction, by another, of "so much of the original . . . as will materially reduce the demand for the original due to the demand having been partially satisfied by the alleged infringing production."¹⁴⁴

The court refused to enjoin defendant's activity, a decision Judge King believed assures the coexistence of the Act and the first amendment.¹⁴⁵

The decision is of great importance since this was the first court to accept the first amendment as an overriding consideration when there was a conflict with the copyright clause.¹⁴⁶ Judge King utilized, though not expressly, the standard urged by this comment. He recognized the public's interest in this type of advertising and used the same line of cases discussed earlier to support the first amendment propositions. Furthermore, he recognized that, in essence, *TV Guide* was attempting to use its copyright to limit access to the discussion of the product.

The *Herald* did not reproduce or in any way use any material copyrighted by *TV Guide*, except in the comparison of covers. The problem of access, therefore, was slightly different than has been previously discussed. We still see, however, an attempt by the holder of the property right to limit access to information, presumably to prevent any kind of comparative advertising. Finally, Judge King rejected any kind of economic argument. The economic injury that was urged is also somewhat at odds with that discussed earlier. Emphasis was nonetheless placed on the first amendment when it was decided that its guaranteed interests are more important. Judge King had, through *Bates*, ostensibly applied the public speech theory of the first amendment to a pure copyright case.¹⁴⁷

144. *Id.* (quoting 23 A.L.R.3d 139, 190 n.10 (1967)).

145. 445 F. Supp. at 884.

146. Though the court rejected defendant's argument that the use of the cover was fair use, it appears to this author that there were solid grounds for making such an argument. The case is at present on appeal to the United States Court of Appeals for the Fifth Circuit, and it is possible that a fair use argument will be accepted.

147. Melville Nimmer was retained by T.V. Guide to aid in writing the brief and in arguing the case before the Fifth Circuit. Briefs have been filed and oral argument is pending.

Nimmer, in appellant's brief, argues that the idea-expression dichotomy represents "not only a principle of copyright law, but demarcates the thrust of the First Amendment in the copyright sphere." He also adds that the courts have uniformly upheld the idea-expression dichotomy. See Brief for Appellant at 15. In support of this proposition, Nimmer cites recent decisions by the Ninth and Second Circuits as well as a brief footnote in a 1977 Supreme Court case. Nimmer continues that the test he has suggested is the most appropriate and that therefore the district court decided the case wrongly. Of course, the purpose of this comment

V. CONCLUSION

This comment advocates a rule whereby the first amendment is a defense to an allegation of copyright infringement. Although simple in its operation, the rule simultaneously protects the interests of the general public and considers the interests of the copyright

is to demonstrate that the standard developed here is more appropriate and, as the text indicates, the *Triangle* case was decided correctly.

The first case Nimmer cites, see Brief for Appellant at 16, is *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). The Ninth Circuit cites Nimmer's law review article, Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970), as authority and argues that the Supreme Court has not considered the impact of the first amendment on copyright because the idea-expression dichotomy already serves to accommodate the competing interests. 562 F.2d at 1170. That court was considering the competing interests in the context of a McDonald's advertising campaign using characters from a children's television show to sell a product. There is admittedly no public interest here and the first amendment defense does not survive. There is genuine public interest, however, involved in comparative advertising and use of the copyright to prevent that should not override the first amendment interests.

Nimmer also cites *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977). Brief for Appellant at 17. *Wainwright Securities* is an institutional research and brokerage firm that produces in-depth analytical reports for private subscribers. The Wall Street Transcript Corp. reproduced parts of the reports without permission, which precipitated a copyright infringement suit. The Second Circuit, in denying a first amendment defense, cited with approval the idea-expression dichotomy. The court, however, distinguished the problem before it from a decision on the first amendment limitation of copyright when dealing with matters of general concern. This is an important distinction and would affect the use of the proposition to support a decision in *Triangle Publications*.

The standard proposed herein leads to the same result reached by the Second Circuit in *Wainwright*. *Wainwright Securities* did not limit access to its material through use of copyright. It would also be difficult to determine that the material was a matter of public interest or concern. Certainly this test would permit the courts to reach more easily this conclusion rather than to attempt to decide if material is similar or dissimilar.

Finally, Nimmer suggests that a footnote in the Supreme Court's decision of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), indicates Supreme Court endorsement of the idea-expression dichotomy. The case revolves around an Ohio law concerning the "right of publicity." Copyright is mentioned only in passing and the footnote he cites does not mention the idea-expression dichotomy. The footnote does note

that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that "no restraint [has been] placed on the use of an idea or concept." *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974). See also *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108, 115-16 (N.D. Cal. 1972) (citing Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970), who argues that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts).

433 U.S. at 577 n.13. This was hardly an endorsement of the idea-expression dichotomy and certainly not a setting from which one could draw such a conclusion.

The courts may tentatively have accepted the idea-expression dichotomy, but that may be explained two ways. First, the courts have not been presented with an alternative, and second, there have been few instances, if any, where the issue has been placed squarely before them. This comment has offered that alternative and has demonstrated how it posits a more effective solution to copyright and first amendment conflicts than the idea-expression dichotomy.

holder. He is penalized only if he attempts to limit access to his work by use of his copyright. His commercial and economic interests are protected if he disseminates his work; so long as economic incentives remain, the incentive to create will endure as well. The first amendment defense, therefore, does not undermine the copyright interests unless the copyright holder abuses his rights.

The scope of copyright protection is further considered in that only subjects of public or general concern must be made accessible to the public. If a copyright holder does not wish to disseminate that which would be considered private information, and such information is made accessible by an infringer, the infringer could not claim a defense of first amendment. The first amendment defense, however, must be upheld when an alleged infringer makes accessible information that is of public or general concern.

Since the test proposed here properly protects the copyright interests and the public's first amendment interests, the Act and the first amendment can certainly co-exist. In certain situations, however, the rights of a private copyright holder must be subordinated to the more vital and far-reaching demands of the first amendment.